Supreme Court, U.S.
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No. 09-964

In The
Supreme Court of the United States

WILLIAM A. McGOWAN,

Petitioner,

v.

DEERE & CO., INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner has presented compelling reasons to grant the Petition where the Seventh Circuit's Opinion affirming the District Court's application of *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1983) does not conflict with any decision of this Court or of any Court of Appeals, nor implicate an important federal question that has not been settled by this Court.

II. Whether Petitioner has presented compelling reasons to grant the Petition by presenting a question – whether the second prong of the *McDonnell-Douglas* test merges with the issue of pretext – which will not affect the outcome of his race discrimination case.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Deere & Company has no parent corporation and no publicly held company owns ten percent (10%) or more of Deere & Company stock.

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STATEMENT OF CASE

McGowan's race discrimination case is based solely on a dispute over his lifting restriction. In the courts below, McGowan framed the issue as one of a discrepancy between medical professionals as to the appropriate weight restriction and conceded that "Deere and its consulting physician, Dr. Candler, believed that such a [twenty-five (25) pound] restriction was appropriate." (McGowan's Appellate Brief at page 8). He presented no evidence that Deere's reason for its decision not to place McGowan on the jobs he desired -- McGowan's weight restriction – was suspect and that its real motivation was discriminatory. McGowan acknowledged the weight restriction was the reason he did not get those jobs. (R.133, 134, 192).[1]

McGowan was employed by Deere at its facility in East Moline, IL, John Deere Harvester Works, during the litigation and his employment did not end in 2004 as he claims in the Petition at p. 3. (R.108). He was a member of a union, the United Auto Workers, and understood that his employment with Deere was governed by a Collective Bargaining Agreement ("CBA"). (R.109). The Industrial Relations Department at John Deere Harvester Works, which is responsible for employment issues relating to the wage work force at the facility, applied the CBA and consulted with module leaders (supervisors) to make decisions regarding McGowan's job placement. (R. 118-20).

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[1] Citation to materials contained in the record before the Court of Appeals is set forth as (R. _____).

McGowan had a history of problems with his back, injuring it in 1999. He was determined to be incapacitated for work on July 3, 2001 in his then current C-6, CNC Sheet Plate Fabricator classification. (R.119). McGowan was reassigned to the position of Material Storage Retrieval in 2001, in accordance with the CBA. (R.119). After his injury in 1999, he had a twenty five (25) pound weight restriction. (R. 119).

McGowan's assertion that Dr. Candler would not allow him to return to his job as a machine operator is false. (Petition, p. 4). McGowan had no contractual right to return to the position of machine operator and did not request to return to that position. (R. 54). This was undisputed before the District Court. (R. 92, 149).

McGowan had surgery on his back in 2004 (Petition, p. 3). On August 5, 2004, Deere's physician, Dr. Candler, and McGowan's back surgeon, Dr. Lanzino, agreed that a permanent restriction of no lifting, bending, reaching, twisting, or pulling of greater than twenty-five (25) pounds was appropriate. (R.119, 123). McGowan presented no evidence to the courts below that Dr. Lanzino believed a permanent twenty-five (25) pound lifting restriction was inappropriate. The July 31, 2004 and October 20, 2004 notes from Dr. Lanzino's nurse practitioner, which indicate McGowan could lift more than twenty-five (25) pounds, were considered by Deere's physician, Dr. Candler, and discussed with Dr. Lanzino, who reiterated he did not disagree with a twenty-five (25) pound restriction. (R.287-288).

Nothing in the record supports McGowan's assertion at page 4 of the Petition that Dr. Candler

ordered a Functional Capacity Examination in 2006 from a physical therapist. However, an FCE was performed by an independent physical therapist and the FCE results were consistent with Dr. Candler's judgment that a twenty-five (25) pound lifting restriction was appropriate for McGowan. (R. 119, 124). Significantly, McGowan's own treating physician, Dr. Cady, found nothing in McGowan's history or physical examination to contradict the findings of the FCE. (R.273, 74).

In making decisions regarding job placement for McGowan, the Industrial Relations Department consulted with module leaders responsible for supervising the production positions at issue, which is a well-established custom and practice under the CBA to determine whether an employee would be able to perform the position at issue, given the employee's capabilities. McGowan's lifting restriction could not be accommodated in the jobs in Departments 106 and 114 for which he was the senior bidder. Accordingly, he was not the "senior qualified applicant" under the CBA. (R.118-20).

When Plaintiff filed suit, he did not just sue for race discrimination. He also claimed he was discriminated against in violation of the ADA. However, he did not dispute that he was incapable of presenting any facts which would support his ADA claim when faced with Deere's Motion for Summary Judgment. (District Court Opinion, Petitioner's Appendix pg. 24).

Contrary to McGowan's assertion at page 4 of the Petition, Deere did not admit he was injured at its plant. (R.29, 53). Also, contrary to McGowan's

assertion at page 4 of the Petition, Deere did not admit McGowan was cleared by his doctor to return to work with only temporary weight lifting restrictions. (R.29, 53). It was undisputed that McGowan had no contractual entitlement to return to the position of Machine Operator under the CBA and did not request to return to that position. (R. 54, 192, 149).

McGowan does not fairly characterize Deere's Motion for Summary Judgment. It was not based merely on his inability to prove pretext. Rather, McGowan presented no admissible evidence that he was qualified for the positions that he sought and presented no evidence of a similarly situated person not in the protected class who was treated more favorably, two of the four elements of his *prima facie* case under the *McDonnell- Douglas* analytical framework. (R. 89-90).

McGowan's assertion at page 5 of the Petition that he provided proof from his own doctor he was qualified for the jobs (he did not have a twenty-five (25) pound lifting restriction) is incorrect. McGowan provided no testimony from his own doctor. Deere's Clinic Progress Notes indicated Deere's doctor spoke with McGowan's doctor and they agreed on the twenty-five (25) pound permanent lifting restriction. (R. 119, 123). The subsequent notes from a nurse practitioner are not "proof from his own doctor" and were considered by Deere's doctor. (R. 287-88).

McGowan's assertion at page 5 of the Petition that he identified other similarly situated employee's of Deere, not of African/American descent, who were allowed to return to the same or similar jobs even though they had more stringent weight restrictions is

false. McGowan submitted his own affidavit which, even if accepted for summary judgment purposes, was insufficient. (Court of Appeals Decision, Petitioner's Appendix at pg. 9-10). McGowan failed to articulate the critical areas of focus between McGowan and his comparators which were the work restrictions each individual had and the duties each individual was required to perform. (Lower Court Decisions, Petitioner's Appendix pg. 7-10, 26-30).

As McGowan notes in his Statement of the Case at page 6, the Court of Appeals held he failed to adequately prove intentional discrimination. (See Court of Appeals Opinion, Petitioner's Appendix, p. 34). Indeed, McGowan failed to set forth any evidence of intentional discrimination or that Deere's stated reasons for not giving McGowan the jobs he wanted were pretextual. Not only did he fail to set forth any such evidence, he conceded Deere had a basis for the lifting restriction and did not dispute the job expectations were such that one with a twenty-five (25) pound lifting restriction could not do the job. (McGowan's Appellate Brief, p. 8).

Moreover, he failed to identify any racial animus on the part of any decision maker or Dr. Candler, the company physician. He testified Dr. Candler was merely mistaken about the lifting restriction (R. 109). He failed to address the fact an independent FCE and an opinion from McGowan's treating physician were consistent with Dr. Candler's judgment. (R. 118-20, 123,124).

McGowan argued that the Court of Appeals decision conflicted with its prior decision in *Peirick v. Indiana University-Purdue University Indianapolis*

Athletics Department, 510 F.3d 681 (7th Cir. 2007) and the opinion of this Court in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). His petition for rehearing *en banc* was denied. (Petition Appendix, p. 36-39). McGowan's reading of these cases is that he need not provide evidence of pretext if he has established a *prima facie* case (which McGowan failed to do) under the *McDonnell Douglas* analytical framework. McGowan wants this Court to hear whether he may maintain a race discrimination case based on a discrepancy as to his appropriate lifting restriction and nothing else.

REASONS FOR DENYING THE PETITION

The decisions below do not conflict with any decision of this Court or any Court of Appeals nor do they implicate a federal question that has not been decided by this Court. They are consistent with the *McDonnell-Douglas* analytical framework articulated by this Court. The reasons set forth by McGowan are wholly insufficient to sustain his burden of setting forth "compelling reasons" for granting his Petition under Sup. Ct. R. 10 (c).

Contrary to his argument, the Seventh Circuit Court of Appeals has not articulated a "merger doctrine" which relieves an employee from proving the employer's stated reason for the employment decision was pretextual under the *McDonnell- Douglas* analytical framework. In addition, the decisions below are entirely consistent with this Court's precedent in *St. Mary's Honor Center v. Hicks*, 509 U.S 502 (1992) and *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000).

Finally, the lower courts properly decided that McGowan failed to present enough evidence to sustain a *prima facie* case under *McDonnell-Douglas* because he failed to present sufficient evidence Deere treated comparable employees less favorably, the fourth prong of the *prima facie* case. Accordingly, merging the second prong of *McDonnell-Douglas* (that he was qualified) with an employee's burden of proving the employer's reason for its employment decision would not change the outcome of this case in any event.

I. "Compelling Reasons" to Revisit the *McDonnell-Douglas* Analytical Framework Do Not Exist Where No Rational Fact Finder Could Find Deere Discriminated Against McGowan Because of His Race.

McGowan argues that this Court should review this case to settle whether "the Seventh Circuit's merger doctrine" first announced in *Coco v. Elmwood Care, Inc.*, 128 F.3d 1177, 1179 (7th Cir. 1997) should be the law of the land as a further elaboration of the *McDonnell-Douglas* analytical framework. He argues that this would be a logical extension of this Court's holdings in *St. Mary's* and *Reeves*. He contends that under Sup. Ct. R. 10(c) this is an important issue of federal law for the Court to consider.

There is no "merger doctrine". McGowan's characterization of Seventh Circuit law and contention that the Court should hear this case to decide whether the doctrine is a logical extension of its holdings is not a "compelling reason" for granting the petition under Sup. Ct. R. 10 (c). In arguing the Court should hear this case because of the so called "merger doctrine," McGowan does not contend that courts have decided

an important question of federal law that has not been, but should be, settled by this Court. He does not argue that the lower courts in this case decided an important federal question in a way that conflicts with relevant decisions of this Court.

McGowan's characterization of Seventh Circuit case authority applying the *McDonnell-Douglas* analytical framework is misguided. He argues that a "merger doctrine" was first announced in *Coco,* 128 F.3d at 1179. However, in *Coco,* the Seventh Circuit rejected the same argument made by McGowan here – that an employee should be relieved of proving pretext if he provides proof he met the employer's expectations.

In *Coco,* the Seventh Circuit explained as follows:

> "The Defendant's expectations are not legitimate if they are phony; so if they are argued to be phony, the issue of legitimate expectations and the issue of pretext seem to merge. *Coco* wants us to merge them – wants us, since he was fired and replaced by a much younger person, to proceed directly to the pretext stage.
>
> To do so would be contrary to the thinking behind the formula. The formula is best understood as derived from a judgment about what evidence would be sufficient to persuade a rational fact finder that the defendant had discriminated against the plaintiff. The judgment is that if the non invidious reason offered by the defendant is not credible, the fact finder can reasonably, though he need not, infer that the real reason was a discriminatory one.

See *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981)." *Coco*, 128 F.3d at 1179.

Applying this Court's decision in *Burdine*, 450 U.S. at 255, n. 10, the Seventh Circuit explained in *Coco* that "this judgment would not make sense without imposing certain preconditions, the most obvious of which is that the employee be a member of a group protected by the anti-discrimination law in question. Less obvious, but still important, is that the employee meet the employer's legitimate expectations. Once the employee is over the hurdle of legitimate expectations (meaning simply bonafide expectations) the issue may indeed merge with the issue of pretext. That is, if the employee presents enough evidence that the expectations were not bonafide, that evidence may also show that the reasons that the employer has given for the employment decision are phony." *Coco*, 128 F.3d at 1180.

The Seventh Circuit's comments in *Coco*, and subsequently in *Hague v. Thompson Distribution Co.*, 436 F.3d 816, 823 (7th Cir. 2006) and *Peirick v. Indiana University-Purdue University Indianapolis Athletics Department*, 510 F.3d 681, 687 (7th Cir. 2007), do not relieve McGowan of his obligation to provide proof from which a rational fact finder could find that Deere discriminated against him based on his race. Ultimately, the "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715 (1983), citing *Burdine*, at 253. McGowan is asking this Court to hear a case where no evidence was presented from

which a rationale fact finder could infer unlawful discrimination.

As this Court explained in *Aikens*, the "*prima facie* case method established in *McDonnell Douglas* was never intended to be rigid, mechanized or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination (citation omitted). Where the defendant has done everything that would be required of him if the plaintiff had properly made out a *prima facie* case, whether the plaintiff really did so is no longer relevant. The district court has before it all the evidence to decide whether the defendant intentionally discriminated against the plaintiff." (emphasis supplied). *Aikens*, 460 U.S. at 715, citing *Burdine*, 450 U.S. at 253.

McGowan implies that a "merger doctrine" is unique to the Seventh Circuit when he states he found no authority from other circuits addressing the issue. (Petition, at p. 9). However, courts in circuits other than the Seventh Circuit have also had no problem dispatching an employee's argument that he should be relieved of the burden of providing evidence of pretext. In *Lilla v. Comao Pico, Inc.*, No. 05-72518, 2007 WL 2050828 (W.D. Mich. July 18, 2007), an employee argued that under *St. Mary's* and *Reeves* he could rely solely upon his *prima facie* proofs to establish pretext. The court rejected this argument, noting it was based upon selective passages from each case cited out of context.

McGowan argues that relieving him of the burden of proving pretext would be a logical extension of *St. Mary's* and *Reeves*. However, nothing in this Court's

decisions in *St. Mary's* or *Reeves* provides a "compelling reason" for this Court to hear this case to determine whether McGowan should be relieved of providing proof that Deere's reasons were pretextual. Indeed, both decisions clearly require an employee to persuade the fact finder that intentional discrimination took place in order to prevail in a Title VII case.

In *Reeves*, this Court explained that the petitioner had "made a substantial showing that the Respondent's explanation for its employment decision was false." 530 U.S. at 144. However, this Court held that the fact finder's rejection of the employer's legitimate non discriminatory reason for its action "does not compel judgment for the plaintiff, the ultimate question being whether the employer intentionally discriminated." In other words, in *Reeves,* the Court reiterated "that it is not enough to disbelieve the employer, the fact finder must believe plaintiff's explanation of intentional discrimination." 530 U.S. at 146-147.

In *St. Mary's,* this Court explained that it had "no authority to impose liability upon an employer for alleged discriminatory employment practices unless an appropriate fact finder determines, according to proper procedures, the employer has unlawfully discriminated." It explained that while "it may, according to traditional practice, establish certain modes and orders of proof, including an initial rebuttal of presumption . . . nothing in law would permit [the Court] to substitute for the required finding that an employer's action was the product of unlawful discrimination, the much different (and much lesser) finding that an employer's explanation of its action

was not believable." 509 U.S. at 514. Accordingly, an "extension" of *St. Mary's* or *Reeves* would not involve relieving McGowan of providing proof that Deere's explanation for its employment decision was untrue.

McGowan asserts that the Seventh Circuit's decision in *Hague* is similar to the facts in this case. (Petition at pg. 10-11). In *Hague,* employees alleging race discrimination asserted that under *Coco* if they asserted the employer is lying about the business expectations required for the position, the second prong and the pretext questions "merge." The Seventh Circuit explained that plaintiffs must still meet their burden of showing pretext and that while it focused on the question of pretext, plaintiffs also did not show they met the employer's legitimate expectations. The Seventh Circuit merely noted that "it is simpler to run through the analysis only once". 436 F.3d at 823.

In this case, McGowan never contended Deere's business expectations for the job were phony and he never set forth any evidence Deere was lying about whether the jobs he wanted could be performed with a twenty-five (25) pound lifting restriction. Indeed, he conceded that the restriction was the reason he did not obtain the jobs. (R.133, 134, 192). McGowan even admits that "Deere and its consulting physician, Dr. Candler, believed that such a [twenty-five (25) pound] restriction was appropriate." (McGowan's Appellant Brief at pg. 8). Accordingly, McGowan was not contesting the legitimacy of Deere's reasons. Instead, he was asking the lower courts to resolve a dispute regarding his lifting restriction as a race discrimination case.

As the Court of Appeals explained, it went to great lengths in *Peirick* to note the circumstances in that case demonstrated the employer's stated reason was suspect. (See Court of Appeals Opinion at Petitioner's Appendix at pgs. 11-12, citing *Peirick,* 510 F.3d at 691-94.) Distinguishing this case from *Peirick,* the Court of Appeals correctly noted that McGowan was mistaken if he believed that he need do no more than demonstrate that a twenty-five (25) pound restriction is inaccurate. The Court of Appeals explained that nothing in *Peirick* indicated an employee is relieved of the obligation of coming forward with evidence of pretext.

The Court of Appeals recognized this Court's cautionary language in *Reeves* that circumstantial evidence probative of intentional discrimination can include proof an employer's explanation for its action is unworthy of belief. However, the Court of Appeals also noted that *Reeves* did not eviscerate the requirement that there still must be circumstances demonstrating the presence of intentional discrimination, the harm Title VII was meant to redress. Here, far from providing circumstantial evidence of pretext, McGowan conceded Deere's reasons were legitimate.

McGowan sums up his argument on the so called "merger doctrine" by making the assertion that "evidence he could lift more than twenty-five (25) pounds is evidence of his qualification for his job and is also evidence that Deere's explanation for its action was just a pretext or a lie." (Petition at pg. 12). But as the Court of Appeals correctly notes, unlike the circumstances of *Reeves* and *Peirick,* there is no evidence suggesting Deere's stated reason for its

decision is suspect. (Court of Appeals Opinion, Petitioners Appendix, p. 9). Indeed, as noted by the Court of Appeals, the medical evidence supports a twenty-five (25) pound restriction. Dr. Candler, Deere's physician, was well acquainted with the fact that McGowan had been under a twenty-five (25) pound restriction following his initial injury in 1999. Deere had an opinion from a physical therapist who completed an FCE that concluded that an across the board restriction of twenty-five (25) pounds on a regular basis was appropriate. McGowan's treating physician, Dr. Cady, did not find any basis to dispute that FCE. McGowan correctly conceded Deere believed its doctor and its doctor believed a twenty-five (25) pound restriction was appropriate. (Appellate Brief at pg. 8).

There is no circumstantial evidence in the record that the lifting restriction or job expectations were a cover for race discrimination. Relieving McGowan of the burden of presenting such evidence would ultimately relieve him of proving Deere's employment decisions were motivated by race. No rational fact finder could have found Deere discriminated against McGowan based on his race and McGowan's mischaracterization of Seventh Circuit case authority is not a "compelling reason" to grant his Petition.

II. The Decisions Below are Wholly Consistent with This Court's Decisions in *St. Mary's* and *Reeves*.

McGowan asserts that the decisions below conflict with *St. Mary's* and *Reeves*, warranting this Court's review under Rule 10(c). Again, McGowan is asking this Court to hear a case based on a discrepancy as to

the appropriate lifting restriction and nothing else. He argues that the lower courts considered Deere's credibility and that conflicting evidence as to whether he could lift twenty-five (25) pounds should have been resolved by the trier of fact. (Petition, p. 13).

Whether McGowan's weight restriction was appropriate was not an issue that was decided by the lower courts. The Court of Appeals correctly declined McGowan's invitation to lead it "down a path of reconciling conflicting medical evidence." (Court of Appeals Opinion, Petitioner Appendix. p. 11). The Court of Appeals' refusal to decide McGowan's weight restriction is not an important federal question decided in a way that conflicts with relevant decisions of this Court which would warrant review under Sup. Ct. R. 10(c).

McGowan selects a quotation from the Court of Appeals and argues its focus was not "whether the restriction was accurate, but the honesty" of Deere's belief. (Petition, p. 13). However, this does not indicate an assessment of Deere's credibility that was properly one for the trier of fact. This comment was about McGowan's failure to present any evidence relating to the issue of whether Deere's stated reason for its employment decision was a pretext.

III. Application of a "Merger Doctrine" Relieving McGowan of Providing Proof of Pretext Would Not Change the Outcome of the Case.

McGowan did not establish a *prima facie* case under the *McDonnell Douglas* framework because he did not present evidence that a similarly situated

person not in the protected class was treated more favorably. (Court of Appeals Opinion, Petitioner's Appendix, pg. 7-10). However, McGowan contends there is a "compelling reason" for this Court to grant review under Sup. Ct. R. 10(c). McGowan contends the finding of the courts below that he failed to sustain his burden of showing evidence of comparables under the *McDonnell-Douglas* framework conflicts with this Court's decision in *Lujan v. National Wildlife Federation,* 497 U.S. at 888-89 (1990), that "one sworn averment" of each disputed fact is sufficient to avoid summary judgment. He also argues that materials must be viewed in the light most favorable to the party opposing the motion under this Court's decision in *Adickes v. S. H. Kress & Co.*, 390 U.S. 144, 158-59 (1970).

McGowan's argument rests on a mischaracterization of the record presented to the courts below. His assertion at page 16 of the Petition that he "identified two (2) [comparable] employees, specifying their weight lifting limitations" is false. McGowan's affidavit was considered by the lower courts and was found to be insufficiently detailed as to his proffered comparators' weight restrictions and the duties each was required to perform. (Court of Appeals Opinion, Petitioner's Appendix pg. 7-10, District Court Opinion, Petitioner's Appendix p. 26-30). The affidavit was procedurally and evidentially deficient as well.

McGowan was asked about the comparators he proffered in Rule 26 Disclosures in written interrogatories and at his deposition during discovery. He <u>never</u> testified about employees not of African/American descent being able to perform the jobs he sought, given the same weight restrictions.

Subsequently, in response to Deere's Motion for Summary Judgment, he filed an Affidavit in which, he testified generally about two (2) employees, Edwards and McLaughlin. (R. 116, 133, 144).

Although he had identified these employees in his interrogatory answers and during his deposition, he only testified that they were treated more favorably than him because they were allowed benefits and placed in temporary positions while recovering from injuries or illness. He did not testify they were allowed to perform the jobs he wanted with similar weight lifting restrictions. (R. 116, 133, 144).

McGowan's affidavit in response to Deere's Motion for Summary Judgment contradicted the disclosures and testimony he provided during discovery. In his Affidavit, McGowan testified that Edwards was allowed to return to work after an injury despite not being able to lift, specifying no specific restrictions or job to which Edwards returned. He testified that McLaughlin, at some unspecified time, was allowed to work in a department in which McGowan sought a job, with a ten (10) pound weight restriction, without identifying the basis for his personal knowledge of McLaughlin's restriction. (R. 209).

While the District Court noted this Court's statement in *Lujan* that the object of Fed. R. Civ. P. 56 (e) "is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit" (District Court Opinion, Petitioner's Appendix, pg. 27), the Court of Appeals held that it need not decide if the affidavit meets appropriate evidentiary criteria, because even accepting it for summary judgment purposes, it is insufficient. (Court

of Appeals Opinion, Petitioner's Appendix pg 8). The Court of Appeals correctly noted that the affidavit provided no evidence to shed light on the specifics of Edward's restrictions. The Court of Appeals further noted that the affidavit provided no information on how the alleged comparables were assessed by Dr. Candler, or even if they were assessed by him, and how the assessment might relate to or possibly conflict with medical records from other medical providers. The Court of Appeals correctly held that McGowan provided insufficient details about his proffered comparators to allow a meaningful comparison and therefore could not make out a *prima facie* case of race discrimination. (Court of Appeals Opinion, Petitioner's Appendix At 9-10).

McGowan has only mischaracterized the record he presented to the courts below on the issue of the comparators he proffered. He has not carried his burden of demonstrating that the decisions below conflict with the decisions of this Court or a Court of Appeals. McGowan has not raised an important question of federal law that has not been settled. He has not carried his burden of setting forth a "compelling reason" as to why this Court should grant his Petition under Sup. Ct. R. 10(c) and this Court should not grant the Petition to address the so-called "merger doctrine" because McGowan cannot establish a *prima facie* case under the *McDonnell-Douglas* analytical framework in any event.

CONCLUSION

McGowan has not established any compelling reasons for this Court to grant the Petition. Therefore, Deere respectfully requests the Petition be denied.

Respectfully submitted,

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